

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 12 of 2013

BETWEEN:

STEPHANIE JORDAN

Employee

and

**CARLISLE BAY ANTIGUA
t/a CARLISLE BAY RESORT**

Employer

Before:

The Hon. Samuel Aymer

Chairman

The Hon. Hayden Thomas

Member

The Hon. St. Lawrence deFreitas

Member

Appearances:

Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers' Federation for the Employee

Ms. Joy Dublin of James, Dublin & Associates, Attorneys-at-Law for the Employee

2013: March 18

2018: November 12

JUDGMENT

Aymer, C:

Preliminary Application

1. Prior to the commencement of the substantive hearing, Mr. Carty submitted a Preliminary Application for the Court's consideration. He contended that the statement in the Employer's letter of Termination giving the reason for the Employee's dismissal, failed to meet the requirements of Section C 10(1) and C10 (3) of the Antigua and Barbuda Labour Code (hereinafter referred to as the Code), which statement the Court would have to rely on to test the fairness or otherwise of the dismissal as being pleaded by the Employer.
2. The written statement of termination was, in his view, "defective in that it speaks to generalities, such as non-conformity with Hotel's policy and unacceptable behavior which

were too broad a brush to be considered precise and/or for the Employee or her representative to interpret the specific cause of action”.

3. He further submitted that in the circumstances the Employer would “essentially be estopped from introducing testimony as to facts (i.e. the precise reason) that led to the Employee’s dismissal, which might have been recited in the said statement. In this regard he cited the case of **Margaret Berridge and Dave Edwards vs Benjies Business Centre (Privy Council Appeal No. 52 of 1995)**.
4. Section C 10 (1) of the Antigua and Barbuda Labour Code states:
 - a) *“Upon termination by an employer of an employee’s employment subsequent to the expiration of the latter’s probation period, the employer shall, within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reason for the termination”*
 - b) And C10 (3) provides thus: *“An employer who furnishes a statement or certificate required by subsection (1)...shall be conclusively bound by the contents therein in any proceeding testing the fairness of the dismissal”*
5. The Court carefully considered this Application and determined that while it would register and take note of Mr. Carty’s submission, we would defer the Application and proceed to trial.

Background

6. Carlisle Bay Antigua is a Company duly incorporated under the laws of Antigua and Barbuda and carries on business as a resort providing all-inclusive services to its guests.
7. Ms Stephanie Jordan, the Employee, resides in All Saints Village in Antigua. She commenced working with the Employer on October 19th, 2004 as a “runner”. On November 1st, 2005 she was promoted to the position of Waitress and was further promoted to the position of Captain on August 21st, 2006 and to Room Service Coordinator. The Employee received yet another promotion on June 30th, 2008, this time to the position of Restaurant Supervisor, which position she held at the time of her termination on January 19th, 2011.

8. As the Restaurant supervisor she was paid \$692.00 per week in addition to a 1.5 point share in the Hotel's Gratuity Fund which, on average, amounted to an additional \$500.00 weekly.

The Employee's Evidence

9. In her Witness Statement and largely repeated in her oral evidence under oath the Employee stated that on January 5th, 2011 while on duty in the restaurant a Mr. Wadham, a guest in the Hotel, came into the restaurant with his two children for breakfast. They had breakfast and left. Some time after, his wife came in to have breakfast and her husband, Mr. Wadham and the children joined her at the table. Mr. Wadham was not wearing a shirt on that occasion. Her evidence is that she went to the table and respectfully told him that the Hotel's policy required that guests should be properly attired in the restaurant.
10. She stated that "from the suddenness of his reaction and facial expression, I realized that he was not quite pleased at being told that he needed to have on a shirt in the restaurant. He immediately got up and left with the children – the wife stayed and continued her breakfast".
11. Later that same day, January 5th, 2011, Mr. Wadham and his children came back to the restaurant about 11.30am. Breakfast had ended and the kitchen staff were preparing for lunch which is served from 12.00 noon. In her uncontroverted testimony under oath she stated that at that time *"it was myself and the bartender in the dining room having sent the staff on a break after breakfast. He went straight to the front to sit. At that time I was putting in my breakfast orders in the micros. I assumed they (the guests) were told times of dining. The guests have a number of ways of contacting the staff. I did not immediately approach Mr. Wadham as I was putting in my breakfast information. He asked me if someone was going to take his order. I told him lunch was served at 12.00 noon and the lunch staff was not yet assembled. Mr. Wadham left and went in the direction of the front office. I had no further interaction with him."* Before leaving *"I observed that he had a look at my name tag"*.
12. According to the Employee in her Witness Statement, she reported for work on the following day and towards the end of her shift, she was invited to a meeting at the Personnel Manager's Office where they were joined by the Food and Beverage Manager. At that meeting the Employee was told that a guest had made a report against her. She further

stated that while she was not told of the exact nature of the report, after hearing the name of the guest, she explained what had happened in the restaurant.

13. At the end of the discussion she stated that the HR Manager said that she had breached Company Policy and asked *"how I was scheduled to work for the rest of the week, after which she left the office"*.
14. The Employee further submitted (all uncontroverted) that she reported for duty and worked for the next four days and that at the end of her shift on January 10th, 2011, the fourth day, she was asked to report to the Personnel Manager's Office where she was handed a letter which turned out to be her letter of dismissal, her Termination Letter.
15. The Termination letter is reproduced below:

"Ms Stephanie Jordan

Liberta

Antigua

10th January, 2011

Dear Ms Jordan,

On Wednesday 6th January 2011 Mr. Wadham complained bitterly to Jonathan Reynolds, General Manager, about his experience with the poor service in Indigo Restaurant. He mentioned that he came to the Indigo Restaurant at 11.40 am, sat down at the table and was totally ignored for twenty minutes.

You were called into a meeting with David Candillon and me to discuss the above. You said you were entering the breakfast items in micros when Mr. Wadham came into the Indigo Restaurant from the Coconut Grove. You stated that he sat at table 24 so you assumed he was waiting for his wife. Minutes later he came to the podium, took some menus and asked if they were the lunch menus. You told him yes then continued to do what you had previously been doing which was entering the breakfast items. Mr. Wadham returned to you after several minutes and asked you if anyone was going to serve him. You told him 'no' since lunch started at midday. Stephanie your actions were deliberate and totally not conforming to our policies and procedures. You were given three opportunities to offer the service required to the guest and failed to do so. Your behavior was totally unacceptable and will not

be tolerated at Carlisle Bay therefore your services will be terminated today Monday 10th January, 2011. This letter serves as confirmation.

Enclosed is a cheque in the amount of EC\$731.16 representing your full and final payment. It is calculated as follows:

Weekly rate: EC\$692.00

Hourly rate: EC\$17.30

Number of hours worked: 48

Total salary to be paid: EC\$830.40

Gross Pay EC\$830.40

Deductions

Medical benefits (3.5%) EC\$29.06

Education Levy (2.5%) EC\$14.51

Social Security EC\$24.91

Thrift fund EC\$20.76

Non Union Dues EC\$10.00

Total Deductions EC\$99.24

Net Pay EC\$731.16

Your service charge allotment will be sent to your Bank account via the next payroll process.

You are required to return all items of uniform and name badge issued to you to the Human Resources Department.

Yours sincerely,

Carlisle Bay Resort Ltd.

Charmaine Gore-Biesheuvel

Personnel Manager.

The Employer's Evidence

16. The Employer's sole witness was its Personnel Manager, Ms. Charmaine Gore-Biesheuvel.

In her Witness statement she stated that on Wednesday 5th January 2011, "a complaint was received from a hotel guest, Mr. Wadham, regarding the poor treatment meted out to him

by a member of staff whilst he was in the Indigo restaurant. Investigations revealed that the staff member was Stephanie Jordan."

17. She stated that the Employee recounted the incident in the Indigo Restaurant when Mr. Wadham entered the restaurant at approximately 11.30am on January 5th, 2011. Her account generally mirrored that given in the Employee's Witness Statement.
18. The Personnel Manager stated further that having conducted its investigations, and providing the Employee with the opportunity to respond to the allegations, the Employer concluded that the Employee failed to provide any, or any satisfactory, reason for her failure to provide Mr. Wadham with professional and courteous service. She continued: *"The Employer found the Employee's actions to be deliberate, rude and totally unacceptable"*.
19. *"As a result of the Employee's action, the Employer was forced to compensate the guest by making a refund to him"*. No evidence was adduced during the hearing or by way of any written document, to corroborate this statement; a matter to which we will return later.
20. The Personnel Manager concluded in her Witness Statement that: *"The type of behavior displayed by the Employee would have a negative effect on the Resort's rating and as such could not be tolerated. The Employer was of the view that the behavior amounted to gross misconduct in the performance of her duties and valid grounds for immediate termination"*.

Mitigation Attempts

21. After Ms. Jordan was terminated she sought to mitigate her loss by seeking employment at Sticky Wicket Restaurant and Verandah Hotel. She found employment at Keyonna Beach Hotel (June to October 2011), and then at Burger King from November 2011 and was still employed at the latter establishment at the time of the trial. At Keyonna Beach she was paid \$450.00 to \$500.00 per week with service charge. At Burger King she was initially paid \$600.00 per week and subsequently \$800.00 per week as Restaurant Manager.

Legal Proceedings

22. Ms Jordan commenced legal proceedings by filing a Reference on March 18th 2013 and her Witness Statement on December 3rd, 2013. An Employee's Memorandum was filed on October 15th, 2013.

23. An Employer's Witness Statement and Employer's Memorandum were filed on April 16th, 2014 and April 11th, 2014 respectively.

The Issues

24. The issues which require determination are as follows:

- 1) Whether or not the letter of termination issued to the Employee by the Employer, on or about January 10th, 2011, meets the standard and satisfies the provision of Section C (10) (1) of the Antigua and Barbuda Labour Code as to the "precise reason" for the dismissal.**
- 2) Whether or not, based on the Guest report of the incident of January 5th, 2011, the Employee's action amounted to misconduct within Sections 58 and 59 of The Code and provided good and sufficient cause for summary termination.**
- 3) Whether or not the Employer followed the process of good industrial relations practices in dealing with this matter after it had investigated the report from the Guest.**
- 4) Was the decision to terminate the Employee reasonable in the circumstances?**
- 5) In the event that Ms. Jordan is held to have been unfairly dismissed, what is the measure of damages due to her?**

The Employee's Submissions

25. Mr. Carty referred to his Preliminary Application filed with the Court on July 1st, 2014 in which he submitted that the letter of termination did not meet the requirements of Section C (10), as it failed to set out the precise reason for the dismissal. (See paragraphs 1 to 5 above). The Court took note of his submission even as it determined to proceed with the trial. We will return to this later.

26. Mr. Carty pointed to the fact, uncontroverted during the hearing and confirmed by the Employer, that since entering into employment with the Employer, on or about October 19th, 2004, Ms. Jordan was promoted three times within the period of 3 years and 8 months from "*Runner*" to *Restaurant Supervisor*.

27. Mr. Carty recounted the incident between Mr. Wadham and Ms Jordan on the morning of January 5th, 2011. He recounted and emphasized the Employee's uncontroverted evidence set out in paragraph 9 to 11 above.
28. Further Mr. Carty reminded us of what transpired afterwards as set out in paragraphs 12 to 14 above.
29. Mr. Carty also emphasized that the meeting culminated in her being asked how she was working for the rest of the week and after responding, she was allowed to leave and to report for duty as normal. She worked for the next four (4) days and at the end of her shift on January 10th, 2011, the fourth day, she was again summoned to the HR Office and issued with a letter of termination which has been reproduced in paragraph 15 above.
30. Ultimately, Mr. Carty submitted that the Employee was unfairly dismissed and is entitled to compensation as pleaded in the Employer's Memorandum.

The Employer's Submissions

31. Ms. Joy Dublin, Attorney for the Employer, submitted that the Employer's policy was to cater for the needs and requests of all guests at all times and that employees were aware of the code of conduct and rules governing service provided to the guests. All guests were important and "were to be met with courteous, pleasant and professional treatment, thus ensuring that each guest was provided with luxurious service that was second to none."
32. She recounted the incident, as per the Employer's submission, which led to the complaint by Mr. Wadham regarding "*poor treatment*" meted out to him by the Employee. His complaint was that while at the Indigo Restaurant on January 5th, 2011 he was not provided with any service despite requesting the same.
33. Ms. Dublin further submitted that, according to the Employer's Personnel Manager, an investigation was held and that the Employee was provided with the opportunity to respond to the allegations made against her, but failed to provide Mr. Wadham with professional and courteous service and did not offer any apologies to either the guest or the Employer for her behavior.
34. The Attorney stated that the Employer found the Employee's actions to be deliberate, rude and totally unacceptable "*as per the norms and values of the Employer's work culture and ethics and was left with no option but to terminate.*"

35. Essentially, Ms. Dublin submitted that the Employee was dismissed in accordance with Part 5, Division C of the Antigua and Barbuda Labour Code.

The Law

36. Under the Labour Code an employee who has served his probationary period (the first 3 months of employment) has the right not to be dismissed without just cause. The Act permits an employer to dismiss an employee with impunity in certain circumstances provided there is a factual basis for the assigned reason.

37. Section C 56 of the Labour Code states as follows:

“Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer without just cause”.

38. Section C 58 (1) and (2) of the Labour Code reads as follows:

C 58(1) “A dismissal shall not be unfair if the reason assigned by the employer therefor

- a) Relates to misconduct of the employee on the job within the limitations of C59(1) and (2);*
- b)*
- c)*
- d)*

Provided, however, that there is a factual basis for the assigned reason.

(2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though the employer acted reasonably, if he is mistaken as to the factual basis for dismissal, the reasonableness of the dismissal shall be no defence, And the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee’s dismissal”.

39. C 59 (1) reads as follows:

“An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course

other than termination. Such misconduct includes, but is not limited to situations in which the employee has

- a. *Conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue:*
- b.
- c.

Issue No 1.

Whether or not the letter of termination issued to the Employee by the Employer, on or about January 10th, 2011, meets the standard and satisfies the provision of Section C10 of the Antigua and Barbuda Labour Code as to the “precise reason” for the dismissal.

- 40. As stated earlier in Paragraphs 1 to 5 above, Mr. Carty for the Employee, made a Preliminary Application which questioned the adequacy of the reasons provided by the Employer for the Employee’s dismissal, in its Letter of Termination having regard to the provisions of Section C (10) of the Labour Code and particularly in respect of the “precise reason” for the dismissal. (That letter is reproduced at paragraph 15 above.)
- 41. In that letter the reasons were given as *“totally not conforming to our policies and procedures.”* The letter then continued: *“Your behavior was totally unacceptable and will not be tolerated at Carlisle Bay therefore your services will be terminated today.....”*
- 42. Mr. Carty contended that the statement by the Employer was defective in that it spoke to generalities and painted *“too broad a brush to be considered precise”*. In support of his submission he cited the case of **Margaret Berridge and Dave Edwards vs Benjies Business Centre (Privy Council Appeal No. 51 of 1995)** in which their Lordships agreed with the *dictum* of Byron J (as then was) in the Court of Appeal, **“that the purpose of section C10 is not merely to ensure that the employee is given reasons for the termination of the employment. It requires those reasons to be given in a form which can be readily identified for the purposes of any subsequent proceedings testing the fairness of the dismissal.”** The reason why they need to be

capable of identification as formal statutory reasons, is that in such proceedings, the employer is conclusively bound by the statutory reasons but not by any other reasons which he may have given.

43. In giving evidence under oath, the Employee was questioned as to whether the Employer issued her with any document which outlined its policies and procedures. She replied that the only document she was given was an “employees’ handbook” which dealt with matters such as hours of work and dress code, mainly for employees. When asked if she was ever issued with any documents on policy and procedures for guests, she replied “No Sir”. She then underlined her reply by the statement “I have never been given a written policy document”.
44. However the Employee gave evidence and confirmed under cross examination by Ms. Dublin, that during orientation and oral briefing, the staff were given certain guidelines such as the “manner in which to respond to guests” and that she was aware of these.
45. Under further cross examination by Attorney Dublin, the Employee admitted that she was aware that having to deal with over 200 guests, some of whom can become irritable at times, can present difficulties for staff but she still had to be courteous. She insisted that this has always been her approach and response during her years of employment with the Employer.
46. Taking the above submissions into account, the Court is of the view that the stated reasons given for the dismissal of the Employee, as set out in the letter of dismissal, were indeed imprecise and did not meet the standards set out in C (10) and cannot be readily identified for the purposes of testing the fairness of the dismissal. Accordingly, at this early stage, we are inclined to conclude that the Employee was unfairly dismissed. However, out of an abundance of caution, we continue to examine the other issues identified above.

Issue No. 2

Whether or not, based on the Guest’s report of the incident of January 5th, 2011, the Employee’s action amounted to misconduct within Sections 58 and 59 of the Code and provided good and sufficient cause for summary termination.

47. In the case of **Caryl Anthony vs BBR Sportive Ltd (Reference No.11 of 2005)** decided in this Honourable Court, **Pilgrim P** quoted from the learned authors of **Smith and Wood's Employment Law, Ninth Edition, Oxford University Press, London, 2008** at page 509 thus:

- i. *“(M)isconduct in the modern statutory context fits into the overall pattern of unfair dismissal law in being essentially a matter of assessing the reasonableness of the employer’s reaction to it in all the varied circumstances of the case it is a particularly wide category of dismissal, ranging from gross dismissal (still justifying summary dismissal) such as theft, violence, willful refusal to obey an order and gross negligence.....”*
- ii. *“Faced with this wide diversity, there is sometimes an unfortunate tendency to over-classify, as if for example the many decided cases establish a ‘law of fighting at work;’ while collecting together all the cases on one kind of misconduct may have some value, it must be stressed that that value is restricted to attempting to point out certain factors which may be important in certain of the more typical cases. Further, these matters remain clearly within the factual jurisdiction of the tribunals.”*
“Conduct cases are very much based on their own facts.....”

48. In the absence of a written Guest Report, or the benefit of any statement from the guest, the Court has had to rely on the accounts of the Employee and the Employer provided in their respective Witness Statements and Memoranda, as well as information adduced from oral evidence under oath. The substantive accounts of the Employee and the Employer bear much similarity with a few variations.

49. The Employee stated that on January 5th, 2011 Mr. Wadham and his children came into the Indigo Restaurant around 11.30am or thereabouts. Breakfast had ended and the kitchen staff was preparing for lunch which was to commence at 12.00noon. After sitting for a few minutes, Mr. Wadham got up and walked to the Employee and asked if no one was going to serve him. It is the Employee’s testimony in her Witness Statement that she politely replied: “Sir, I am very sorry. Lunch is served at 12.00

- noon". He (Mr. Wadham) did not reply but looked at her name tag and then left the restaurant. According to the Employee "the day ended uneventfully".
50. It is noteworthy and very instructive that the guest was not called as a witness and was not present to confront or to be confronted by the Employee during the investigation. According to the Employer, at 11.30 am Mr. Wadham entered the restaurant and sat at a table. After sitting at the table for some minutes, Mr. Wadham approached the podium and having confirmed with the Employee that the menus displayed on the podium were lunch menus, collected some copies of menus and returned to his table. Several minutes later, the Employee was again approached by Mr. Wadham who enquired as to whether or not he would be served. In response to this query, the Employee advised Mr. Wadham that lunch would be served at 12.00 noon. At that point Mr. Wadham left the restaurant.
51. It is not in dispute that the Employee reported for work the next day, i.e. on January 6th, 2011 and towards the end of her shift, was summoned to a meeting with the Personnel Manager and the Food and Beverage Director. While there she was asked to respond to a complaint from a guest, a Mr. Wadham, about the quality of the service he had received at the Restaurant.
52. It is also not in dispute that after providing her explanation, the Employee was asked to return to work and continued to work, as usual, for the next four days. At the end of her shift on January 10th, 2011 on the fourth (4th) day, she was asked to report to the Personnel Manager's office where she was handed her letter of dismissal.
53. In the circumstances, the key question is: Did the incident of January 5th 2011 just prior to the lunch interval, provide good and sufficient cause for summary termination?
54. We have taken note of the incident which took place earlier on the same day between the Employee and the same guest where the Employee brought to the attention of the guest his breach of the Hotel's dress code (i.e. being shirtless) while using the restaurant facilities. We note the Employee's unchallenged observation of the demeanour of the guest following this exchange, and we note too, that this was not mentioned in the subsequent 'investigation', of the pre-luncheon episode.
55. Unfortunately, the Court will never know what bearing the earlier "shirtless" incident may have had on the subsequent pre-luncheon episode, as the Guest was not present to

be questioned on this matter nor was this discussed with the Employee during her meeting. Notwithstanding, to treat the pre-luncheon episode *in vacuo* was, in our view, a missed opportunity to provide some context to, and may well have had a bearing on, the overall exchanges during the entire day of January 5th 2011.

56. Moreover, the Employer did not state any specifics and/or give any details of what exactly was the extent of the guest's report/complaint against the Employee save that the guest reported having received "poor treatment" from her.
57. By way of providing further gravity to its summary termination decision, the Employer alluded to the power of the internet "in disseminating a single bad experience of a single guest" and "the adverse effect that a single negative experience of a guest of the hotel could have on the hotel's ratings". While there may be some truth in this in a general way, in the instant case we consider this to be speculative as no evidence was adduced to indicate that the hotel had been affected as a result of this incident. In any event, in our opinion, the incident was insufficient to ground a summary dismissal decision.
58. In addition, the court learned from the Personnel Manager, through her Witness Statement, that "as result of the Employee's action, the Employer was forced to compensate the guest by making a refund to him". No evidence whatsoever was presented in support of this assertion. Consequently we were unable to attach credence to this statement.
59. The Employer's conclusion, arising from all the accounts of exchanges between the Employee and Mr. Wadham during the mid-day incident of January 5th, 2011 at the Indigo Restaurant, was that the Employee's behavior "amounted to gross misconduct in the performance of her duties and valid grounds for immediate termination".
60. We recall the definition of **gross misconduct** provided by the learned authors of **Smith and Wood's Employment Law** – (referred to in paragraph 48 above), which includes actions such as **theft, violence, willful refusal to obey an order and gross negligence et al.**...Based on the accounts of the written statements provided by both the Employee and the Employer and the oral evidence provided under oath at trial, the Court is unable to agree that the exchanges between Mr. Wadham and the Employee amounted to gross misconduct.

Issue No 3.

Whether or not the Employer followed the process of good industrial relations practices in carrying out its investigation and in dealing with the matter after it had investigated the report from the Guest.

61. Good industrial relations practices and procedures seek to ensure that the principles of natural justice are always afforded to participants in industrial relations disputes.
62. It is a basic principle of **natural justice** that an employee who is accused of committing an offence of misconduct is deserving of a fair hearing before the employee is dismissed. The principles of natural justice in the context of the requirement of an employer to institute a proper investigation were outlined by **Rawlins J (Ag.) (as he then was)** in **The Epicurean Ltd vs. Madeline Taylor Civic.App.No 4 of 2003**. At page 10 paragraph [33] **Rawlins J A** stated *inter alia* as follows:

“Natural Justice

(33) The principles of natural justice are well known, trite and ancient. It is said that the rules that required a fair hearing before impartial adjudicators can be traced to ancient times, were known in medieval precedents and reached a ‘high water-mark’ in their development in Dr. Bonham’s case (1610) 3 Co.Rep.113 b. Indeed we were reminded that, although their disobedience was obvious, even Adam and Eve were given the opportunity to speak in their defence before they were cast out from the Garden of Eden”.

63. The employer was obliged to carry out a sufficiently thorough investigation of the incident which took place on January 5th, 2011.

64. In the instant case, we have carefully considered the sequence of events starting at breakfast time on Wednesday, January 5th, 2011 up to the date of the Employee's dismissal on January 10th, 2011.
65. Under cross examination, the Employer's Personnel Manager when asked: *"Give your HR background, what might have been the proper course of action to take in this matter?"* The personnel Manager replied: *"This is something we had to put a lot of thought into because termination is always the last resort... Her (the Employee) conduct was immoral"*. When put to her that the action of the Employer did not comport with "best practices" in this matter, the Personnel Manager answered that: *"We did not follow best practice in this case as we found the Employee's action to be deliberate because she had many opportunities to serve the guest and totally ignored him"*.
66. As pointed out by Mr. Carty, on behalf of the Employee, the Employer had access to, and may well have applied the Disciplinary Code and Procedures as regards the Employee's entitlement under the Collective Agreement between the Union the Hotels and Tourist Association, of which the Employer is a Member Hotel. Embedded in this Code is a system of warning, thus giving the Employee an opportunity to improve her conduct.
67. For her part during examination under oath, the Employee when asked: *"Is there anything you could have done differently?"* She replied: *"Maybe I could have said something to him"*. And under cross examination she conceded that *"I should have acted differently based on hindsight"*.
68. Further, and still under oath, the Employee stated that after the incident: *"I worked four days without going back to the office"* and conceded: *"I thought I might have been given a verbal warning because the customer complained. Management said nothing further. I believed that was the end of the matter"*.
69. In all of this, however, the Court is mindful that the Employee did not have the benefit of confronting her accuser and the opportunity of participating in exchanges that might have shed more light on this incident.
70. In particular, as to whether the luncheon incident may have been a carryover from the breakfast exchange between the Employee and the guest, will never be known. The

indication is that her accuser had already departed these shores and she was therefore deprived of any such opportunity. Yet *“natural justice does require not merely that a man shall have the chance to state his own case in detail; he must know in one way or another sufficiently what is being said against him. If he does not know sufficiently what is being said against him, he cannot properly put forward his own case”*. **See the observations of Slynn J in Bentley Engineering Co. v Mistry [1979] I.C.R 47 at page 51 letter D.**

71. Consequently we are of the view that the Employer did not follow the process of good industrial relations practices in dealing with the matter after it had investigated the report from the Guest. Whether or not the Employer's action in dismissing the Employee was reasonable or unreasonable is a concern to which we will now turn our attention.

Issue No. 4.

Was the decision to terminate the Employee reasonable in the circumstances?

72. We again turn to the sequence of events following the luncheon occurrence in the Indigo Restaurant.
73. However, the Court has taken notice of the Employee's exemplary record evidenced by the rapidity of her promotions from "Runner" to Waitress to Restaurant Captain to Room Service Coordinator to Room Services Supervisor and eventually to Restaurant Supervisor, in approximately four years. Consequently, the indications are that her conduct and industry as regards the hotel's operations were above average. Against this background, the Employee gave evidence both through her Witness Statement and under oath, that on the receipt of her termination letter: "I was in shock. I have been complimented by guests. I love what I do and was a good worker."74.
74. The Court also took note of her deportment in giving her evidence under oath and her frankness in conceding that with the benefit of hindsight she could conceivably have been more helpful and positive in her dealings with Mr. Wadham during the luncheon incident. At the same time the Court was not unmindful of the earlier breakfast exchange between the Employee and the said guest of which the luncheon incident may

well have been a sequel. Accordingly, we are of the view that the Employer's action in summarily dismissing the Employee was unreasonable.

The Decision

75. In all the circumstances of this case the Court finds that (a) the generalised nature of the reasons given for the dismissal in the letter of termination, fell short of the requirements of Section C (10) (1) of the Labour Code; (b) Ms. Jordan's behavior on January 5th, 2011 did not amount to misconduct or gross misconduct under Section 58 and 59 of the Labour Code; (c) the investigatory process followed by the Employer fell short of the standard described in paragraphs 63 and 64 above; and (d) the Employer did not act reasonably as it could have taken into account extenuating factors such as the Employee's period of service, her level of productivity exemplified by her rapid promotions as set out in paragraph 78 above, thus buttressing her exemplary service. Consequently the Court finds that the Employee was unfairly dismissed.

Issue No. 5

In the event that Ms. Jordan is held to have been unfairly dismissed, what is the measure of damages due to her?

76. An employee whom the Court holds was unfairly dismissed is entitled to certain awards under specific established headings. The awards to which Ms. Jordan is entitled are as follows:

a) Basic Award

This award is similar to severance pay. The Employee earned an average weekly pay of \$1,192.00 or \$5,165.33 per month. She worked for the Employer from October 19th 2004 until January 19th, 2011. This is 6 years and 4 months. Her entitlement under this head is therefore $\$5,165.33 \times 6.3 = \$32,541.60$

b) Immediate Loss

This takes into account the effort which Ms. Jordan made to mitigate her loss by way of finding employment. She gave evidence that she made

applications to Sticky Wicket Restaurant, Verandah and Keyonna Hotels. She found employment at Keyonna from June to October 2011 which paid a wage of \$450 to \$500 weekly. She was later successful in finding

employment at Burger King paying initially \$600 and subsequently \$800 per week as Restaurant Manager. Based on her effort a period of four (4) months is awarded under this heading. The sum due to her is **\$20,661.32**

c) Manner of Dismissal

No award is made under this heading.

d) Future Loss

No award is made under this heading.

e) Exemplary Damages

We consider it appropriate that an award of exemplary damages be made in this case. The Employee's performance was exemplary as evidenced by the Employee's rapid advancement within the organization (as outlined in paragraph 71 above) and the increasing levels of responsibility with which she was entrusted. She served the hotel well for 6 years and 4 months.

There was a very clear and blatant disregard for the principles and practices of good industrial relations. Having regard to the above, we find the dismissal of the Employee in these circumstances to be harsh and oppressive and consequently, we make an award under this head of **\$10,000.00**

f) Notice Pay

The sum awarded is one month's pay or **\$5,165.33**

77. The Employer shall pay to the Employee the sum of **\$68,368.25** on or before 15th December 2018. There shall be no order as to costs.

Dated the 12th day of November 2018



Samuel Aymer

Chairman



Dr. Hayden Thomas

Member



St. Lawrence de Freitas

Member